SERVED: April 6, 2001

NTSB Order No. EA-4888

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 6th day of April, 2001

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. ANDREW B. JONES, Respondent.	Docket SE-16214

OPINION AND ORDER

The Administrator has appealed from the oral initial decision Administrative Law Judge William R. Mullins rendered in this proceeding on March 20, 2001, at the conclusion of a three-day evidentiary hearing.[1] By that decision, the law judge reversed an emergency order of the Administrator revoking the respondent's airline transport pilot (ATP) certificate. The law

[1]An excerpt from the hearing transcript containing the initial decision is attached.

judge concluded that the Administrator had not established her allegations that the respondent had falsified flight records involving training he had received and practical flight tests and check rides he had administered to other pilots, in violation of section 61.59(a)(2) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 61).[2] For the reasons discussed below, the appeal will be denied.[3]

This is the second case to emerge from the Administrator's intense and lengthy investigation of Sunjet Aviation, Inc. following a crash of one of its aircraft in October 1999 that killed all five persons aboard, including professional golfer Payne Stewart. In the first case, Administrator v. Fuller, NTSB Order EA-4887, also decided today, we sustained a law judge's reversal of emergency orders that sought to revoke the airline transport pilot certificates of four airmen who piloted Sunjet's Lear aircraft on a part-time basis. The law judge was not persuaded by the Administrator's attempt in that case to show, by reference to apparent discrepancies with other Sunjet documentation involving aircraft utilization, that the four

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[2] FAR section 61.59(a)(2) provides as follows:

§ 61.59 Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.

(a) No person may make or cause to be made:

* * * * *

(2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used to show compliance with any requirement for the issuance or exercise of the privileges of any certificate, rating, or authorization under this part....

[3] The respondent has filed a reply brief opposing the appeal.

pilots had intentionally falsified certificates of training demonstrating their qualification to operate certain Sunjet aircraft. The same law judge heard this case, and he again found against the Administrator on the issue of intentional falsification. He concluded, essentially, that the testimony of respondent, Sunjet's check airman, and his pilot witnesses vouching the bona fides of their training and check rides should be given more weight than the suspicions of falsity allegedly raised by discrepancies between the documents recording the flights and corresponding aircraft logs and the insistence of an FAA inspector that the checks were not performed properly or would have taken more time to properly complete than the available training forms indicated they had taken. As in Fuller, we are not convinced that we should disturb the law judge's acceptance and crediting of live testimony over the contested opinions of the inspector and his reliance on records of uncertain accuracy. His decision amply discusses his reasoning, and the Administrator's brief does not establish that the law judge's findings and conclusions are arbitrary or based on inherently incredible testimony. They are therefore entitled to our deference, notwithstanding the Administrator's belief that the testimony of respondent and his witnesses should be discarded as self-serving because they could not produce Sunjet or other records to substantiate their accounts of the matters in issue.

The Administrator repeats here the argument, rejected in Fuller, that the law judge employed too strict a standard in

weighing her documentary evidence against the testimonial evidence adduced in the respondent's case. Our answer to that contention in Fuller is no less apposite here:

> We find no merit in the Administrator's argument that the law judge applied some standard higher than preponderance of the evidence for the burden of proof in this matter. The law judge's observation, consistent with court and Board precedent alike, that the circumstantial evidence of intent in a falsification case must be "so compelling that no other determination is reasonably possible" (I.D. at 353), speaks not to the quantum of proof necessary for the Administrator to prevail, but to the probative quality of the evidence required to justify a finding of actionable scienter. Where, as here, a law judge credits the testimony of a respondent on the issue of intent to falsify, it is the predominate weight of that testimony in a case of this kind that tips the evidentiary scale away from a violation finding.

The law judge was not required, in a case where the documentary submissions were not shown to be immune to reasonable challenge on grounds of accuracy and completeness, to discount live testimony he found believable and compelling in favor of records he did not believe told the whole story.

Last, we do not agree that the law judge abused his discretion by granting the respondent's motion to strike the Administrator's amended complaint, which added allegations of additional check rides the Administrator believed had not occurred. Because any amendment that adds to a respondent's evidentiary burden in an emergency case could be said to be at least potentially prejudicial, given the exceptionally short discovery time available before a hearing must be held, our regulations, see Rule 55(e) of the Board's Rules of Practice, 49 C.F.R. 821.55(e), obligate a law judge to ensure that good cause

supports all such amendments.[4] While the Administrator suggested that because of grand jury requirements she could not make the additional records public until the court permitted their release, she did not demonstrate that the court could not have been asked sooner than it was to issue such an order. The law judge could therefore reasonably find that no showing amounting to good cause had been made that the additional records could not have been part of the original complaint. The timing of that filing was, of course, entirely within the Administrator's control.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and

2. The initial decision is affirmed.

CARMODY, Acting Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

[4]In limited circumstances, a law judge could permit an amendment without a showing of good cause if the amendment involved a minor, non-prejudicial change, such as one to correct the complaint to reflect the charge the allegations actually referenced. See Administrator v. Adams, 3 NTSB 3142 (1980) at n.3.